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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT CLARK,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 18A02-0511-PC-1088

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Richard A. Dailey, Judge
Cause No. 18D02-9110-CF-65

September 26, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Robert Clark appeals the denial of his petition for post-conviction relief. We affirm.

Issue

The sole restated issue is whether Clark may challenge his sentence in a post-conviction proceeding.¹

Facts

In 1992, Clark pled guilty as charged under an “open plea” agreement to burglary, a Class C felony, and theft, a Class D felony. The trial court sentenced Clark to eight years for the burglary and three years for the theft, to be served consecutively. The entirety of Clark’s sentence was suspended on the condition that he undergo and complete drug treatment with the Indiana Department of Mental Health (“DMH”). On June 10, 1992, Clark was admitted to DMH, and on July 16, 1992, Clark walked out of the treatment program without permission. On July 27, 1992, the trial court issued a warrant for his arrest. Clark never initiated an appeal of his sentence.

On March 7, 2003, the Delaware County Jail informed the trial court that Clark had been apprehended. On July 3, 2003, Clark was found to have violated the conditions of his probation, and the court imposed his eleven-year previously suspended sentence. Clark appealed the revocation of his probation and the reinstatement of his suspended

¹ We have denied Clark’s “Motion to Grant Appeal on Grounds of Default.” Contrary to Clark’s assertion in that motion, the State timely filed its brief on July 12, 2006.

sentence, which this court affirmed. Clark also attempted to challenge the merits of his original sentence, but we refused to consider that argument.

On December 30, 2004, Clark requested the permission of this court to file a belated notice of appeal, which we denied on January 11, 2005. That same day, Clark filed a pro-se petition for post-conviction relief challenging the legality of his sentence, asserting the unreasonableness of his sentence, and alleging ineffective assistance of counsel. The petition was denied on October 27, 2005. The post-conviction court concluded:

Defendant knew well that all he had to do was follow the guidelines of his drug treatment program, and the penal sanction would not be imposed. Instead, he spurned his treatment program, leaving his treatment facility and eluding law officers for more than ten (10) years. During that time, Defendant allowed his right to appeal his sentence to expire, and, while he may have had a right to appeal his sentence when it was imposed, he waived such a right by trusting in the length of his legs rather than the appellate system. His self-imposed absence from the judicial system is not an excuse for his failure to exercise his right to appeal.

App. p. 6. Clark now appeals the denial of his petition for post-conviction relief.

Analysis

Clark contends on appeal that the imposition of his sentence was illegal and manifestly unreasonable and thus, his petition for post-conviction relief was improperly denied. In response, the State asserts that Clark has waived his right to challenge his sentence by procedural default. We confine our analysis to addressing the procedural issue.

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Walker v. State, 843 N.E.2d 50, 56 (Ind. Ct. App. 2006), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions of law. A post-conviction court's findings and judgment will be reversed only upon a showing of clear error that leaves us with a definite and firm conviction that a mistake has been made. Id.

Here, Clark plead guilty as charged under an open plea agreement to burglary, a Class C felony and theft, a Class D felony. An "open plea" is defined as one in which sentencing is left to the trial court's discretion. Brewer v. State, 830 N.E.2d 115, 118 (Ind. Ct. App. 2005), trans. denied. A person who pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal. Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004). However, a person who pleads guilty is entitled to contest on direct appeal the merits of a trial court's sentencing decision where the trial court has exercised sentencing discretion, i.e., where the sentence is not fixed by the plea agreement. Id. The proper procedure for an individual who has pled guilty to challenge the sentence imposed is to file a direct appeal or, if the time for filing a direct appeal has run, to seek permission to file a belated appeal under Indiana Post Conviction Rule 2. Id. at 233.

Because a post-conviction relief proceeding is not a substitute for direct appeal but rather a process for raising issues unknown or not available at trial, an issue known and available but not raised on direct appeal may not be raised in post-conviction proceedings. Id. at 232. The fact that the trial court, at a guilty plea hearing, does not advise the defendant in an open plea situation that the defendant has the right to appeal the sentence to be imposed does not warrant an exception to the rule that sentencing claims must be raised on direct appeal and not in a post-conviction proceeding. Id. at 233. In this case, Clark did not file a direct appeal and thus, he has forfeited his sentencing error claim. Pursuant to Collins, Clark's petition for post-conviction relief was properly denied.

Clark did request permission from this court to file a belated notice of appeal, which we denied. Indiana Post-Conviction Rule 2(3) provides:

Any eligible defendant convicted after a trial or plea of guilty may petition the appellate tribunal having jurisdiction by reason of the sentence imposed for permission to pursue a belated appeal of the conviction where he filed a timely notice of appeal, but:

- (a) no appeal was perfected for the defendant or the appeal was dismissed for failing to take a necessary step to pursue the appeal;
- (b) the failure to perfect the appeal or take the necessary step was not due to the fault of the defendant; and
- (c) the defendant has been diligent in requesting permission to pursue a belated appeal.

A defendant can seek permission from this court to pursue a belated appeal only “where he filed a timely notice of appeal” Clark made no such timely filing in this case.

Accordingly, we could not grant Clark permission to pursue a belated appeal under this rule. Furthermore, as Collins makes clear, Clark could not circumvent our denial of permission to pursue a belated appeal by pressing his sentencing claims in a post-conviction proceeding.

If no notice of appeal ever was timely filed, as was the case with Clark, a defendant must seek permission from the trial court to file a belated notice of appeal under Post-Conviction Rule 2(1), which provides:

Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

- (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
- (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

The rule also provides a petitioner the right to appeal a trial court's denial of a belated notice of appeal. Ind. Post-Conviction Rule 2(1). In this case, Clark erred in filing his initial request for permission to file a belated notice of appeal with this court. Indiana Post-Conviction Rule 2(1) requires such a request to be filed with the trial court and our decision today does not preclude Clark from making such a request.² Given our

² Clark asserts that in our decision affirming the revocation of his probation, we informed him that he could not challenge the propriety of his original sentence when appealing that revocation, but “stated that Clark could file a petition for post-conviction relief.” Appellant’s Br. p. 2. What we said in that decision was, “to the extent Clark believed that the sentence imposed was a consequence of ineffective assistance of counsel or to the extent he had other grounds for collateral relief, Clark could have filed a petition for post-conviction relief.” Clark v. State, no. 18A02-0307-CR-594 (Ind. Ct. App. Feb. 6, 2004), slip op. at

resolution of the procedural issues in this case, we will not address the merits of Clark's sentencing claim.

Conclusion

Because Clark failed to file a direct appeal or properly seek permission to file a belated appeal, we conclude the trial court did not err in denying his petition for post-conviction relief. We affirm.

Affirmed.

SULLIVAN, J., and ROBB, J., concur.

8. On appeal, Clark has not alleged that he received ineffective assistance of trial counsel or that there are "collateral" grounds for relief from his sentence.